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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-686

JILL S. LOESER,

Petitioner,

vs.

JULIUS LOESER,

Respondent.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The extraordinary length of the Respondent's Brief in Opposition to the Petition for Certiorari is obviously an attempt to obfuscate the sharply defined issues raised by the Petition herein. Since many of the statements contained therein are not germane to these points, no attempt will be made to reply to them seriatim.

The Brief in Opposition filed by Respondent herein, rather than demonstrating that the Petition for Writ of Certiorari should not be granted, shows why the Petition ought to be granted. The attitude of Respondent, which was adopted by the Courts of Indiana, is based upon several faulty premises. It is to review these premises, which do rise to constitutional dimensions, that Petitioner files the Petition herein.

The first premise is that the Indiana Courts had jurisdiction over the original divorce proceeding herein. Respondent argues that Petitioner failed to appear in the original divorce proceeding for the purpose of frustrating the jurisdiction of the Indiana courts. But, as demonstrated in the Petition herein, that Court had no jurisdiction over either Petitioner or the minor child of the parties, insofar as custody of the child was concerned. Petitioner was not a resident of Indiana at the time the original divorce suit was instituted. She was not personally served with summons either in Indiana or Illinois. There is nothing in the record in this cause which shows that any summons was served upon her in any manner. The assertion is made that the summons was served by mail at her domicile, but there is nothing in this record, other than the bald assertions by counsel that the service of the summons was at the address at which she resided at the time. The fact that she had obtained actual knowledge of the proceedings in some manner, and had an observer in Court at the time of the original hearing cannot confer jurisdiction upon a court which it did not have. This lack of jurisdiction was not waived by having an observer present.

Of even more importance, the Indiana courts did not have jurisdiction over the minor child of the parties. Respondent completely ignores the most important fact in

this situation: He had deprived the Court of jurisdiction over the minor child of the parties by himself removing it from the jurisdiction of the Court and turning the child over to Illinois residents. It was his action, not that of Petitioner, which deprived the Indiana Courts of jurisdiction. Petitioner sought relief in the proper forum—the state of domicile or both herself and the child—Illinois. It was as a punishment for these actions that the Indiana courts later deprived her of the right to be heard on the issue of child custody. Respondent ignores these facts in claiming that there is no constitutional issue. The fact that this Court denied Petitioner's Petition for Writ of Certiorari from the judgment of the Illinois Supreme Court does not preclude it from now granting this Petition. The Illinois Supreme Court did not decide the issue which Petitioner presents to this Court now: whether the Indiana statutes regarding service of process meet those standards of due process which this Court has laid down. As demonstrated in the Petition for Writ of Certiorari, those statutes do not. Lack of jurisdiction may be raised at any time —even for the first time on appeal, or by way of collateral attack. *In Re Carmen's Petition*, 165 F. Supp. 942 (N.D. Cal. 1958); *Wymard* v. *McCloskey & Co.*, 342 F.2d 495 (3d Cir. 1965), cert. den. 382 U.S. 823; *Mahoney* v. *Northwestern Bell Tel. Co.*, 377 F.2d 549 (8th Cir. 1967).

Respondent contends that the refusal to allow Petitioner to introduce relevant and pertinent evidence in the post-decree hearing is not a constitutional issue. Is local law exempt from due process? Certainly not. One misconception must be corrected at the outset. In responding to this point, Respondent again distorts Petitioner's argument. Her central complaint is not that she was prohibited from introducing evidence of things which occurred prior to the

entry of the divorce, but that she was precluded from introducing evidence of events which occurred *after* the divorce was granted, and while she held custody of the child pursuant to the lawful order of the Illinois courts. There is no argument or authority to support such a ruling. None has been advanced by Respondent, or by the Indiana courts during these proceedings. It is this arbitrary and punitive ruling which deprived Petitioner of her rights to a full hearing on the issue which is central to the future of a young child—with which parent shall he live; by whom shall he be raised?

Petitioner is not asking this Court to resolve the custody issue, or even to review the decisions made by the Courts below on this issue. What she is asking is that she be given an opportunity to be heard and to introduce evidence on this issue which is clearly proper.

Contrary to Respondent's arguments, Petitioner does not ask this Court to review the substantive law of the State of Indiana as it pertains to divorce and child custody, or to review the decisions made upon the evidence which was presented. She does ask this Court to review obviously arbitrary and capricious and punitive actions visited upon her because she sought to present these same issues in a court which ultimately held that it did not have jurisdiction (although that holding was based upon orders of the Indiana Courts, which did not have jurisdiction on the child custody issue).

While Respondent attacks Petitioner as immoral and unfit to have custody of her child, no such evidence has ever been introduced in any court.

Respondent's argument that this Court has no jurisdiction to grant this Petition is frivolous and an affront to

this Court. Is it not a denial of due process to deny a person a full and fair hearing? Cannot a judge deprive a person of due process as surely as an unconstitutional statute? The answer is obvious.

The prime example of the vindictiveness of the trial judge here is his *sua sponte* limitation of Petitioner's right to communicate with her child by telephone, even though no such relief was requested, and was not at issue. Even though the only issue before him was Petitioner's request that she be given more rights to custody and visitation, he curtailed her visitation rights, with no evidence whatsoever to support such action. She was foreclosed from introducing evidence after the divorce, for a period of one year —twenty per cent of the child's life at that time. This is not a mere matter of local law. It is a deprivation of the right which separates a civilized society from a barbaric one—the right of a person to have a full and fair opportunity to present his side of the controversy and to have a decision based upon all competent and relevant information.

In addition, a child has such due process rights as well. A child should not be the pawn of an arbitrary judge. He, too, has the right to a full and fair determination of his future. Indeed, his rights are in fact paramount. A full determination of those rights based upon all competent evidence is required, and cannot be cut off by the whim of an arbitrary judge.

This Court has ruled in a number of cases that a full and fair hearing must be held before a person may be deprived of a constitutionally protected interest. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701 (1972); *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983 (1972); *Perry* v. *Sinderman,* 408 U.S. 593, 92 S.Ct. 2694

(1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970). This is such a right. A full hearing on the deprivation of that right has been denied. It matters not at all whether that deprivation is the result of a state statute, an administrative regulation, or the whim of a judge. The right to due process has been infringed.

This Court should grant certiorari to review that infringement.

Respectfully submitted,

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